TAN WEI HONG & ORS v. MALAYSIA AIRLINES BHD & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF CJ
ZULKEFLI AHMAD MAKINUDIN PCA
RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEALS NO: 02(f)-29-03-2017(W), 01(f)-14-05-2017(W) & 01(f)-15-05-2017(W)]
28 MARCH 2018

CIVIL PROCEDURE: *Striking out – Statement of claim – Claim by dependants of deceased passengers on board flight MH 370 – Test for striking out – Whether claim sustainable – Whether action against Malaysia Airlines Berhad (MAB) sustainable – Whether MAB assumed liabilities of Malaysian Airline System Berhad – 'Carrier' under article 21 of Montreal Convention 1999 – Whether primary duty of military air force was to guard safety of Malaysian airspace from external threats to sovereignty of nation – Whether action against air force obviously unsustainable – Rules of Court 2012, O. 18 r. 19*

TORT: *Vicarious liability – Liability of Government – Claim by dependants of deceased passengers on board flight MH 370 – Liability of government as employer of Director General of Department of Civil Aviation and Royal Malaysian Air Force – Whether governed by s. 5 of Government Proceedings Act 1956 – Whether involved factual determination – Whether there were triable issues to be fully argued at trial – Whether application to strike out claim ought to be dismissed – Rules of Court 2012, O. 18 r. 19*

The three related appeals herein were: (i) Civil Appeal No. 01 (f)-14-05-2017(W) – where the appellants were the plaintiffs at the High Court ('the plaintiffs'); and the respondent was Panglima Tentera Udara Diraja Malaysia ('the fourth defendant'); (ii) Civil Appeal No. 01(f)-15-05/2017(W) – where the appellants were Ketua Pengarah Jabatan Penerbangan Awam Malaysia ('the third defendant'); and the Government of Malaysia ('the fifth defendant'); and (iii) Civil Appeal No. 02-29-03/2017(W) – where the appellants were the plaintiffs and the respondent was Malaysia Airlines Bhd ('MAB'), the second defendant. Appeals (i) and (iii) were the plaintiffs' appeal against the dismissal of their appeal by the Court of Appeal ('CA') in relation to an application for striking out application under O. 18 r. 19 of the Rules of Court 2012 ('ROC') by the second and fourth defendants, which resulted in both the second and fourth defendants being struck out as defendants in the writ action. Appeal (ii) was the third and fifth defendants' appeals against the decisions of the CA dismissing their appeals in relation to their striking out applications under O. 18 r. 19 of the ROC.

The plaintiffs sued as dependants of the deceased persons who were passengers on board flight MH 370 bound for Beijing from Kuala Lumpur on 8 March 2014; the said flight however did not arrive at its destination and after going missing for some time, the Government announced that all passengers on board were presumed dead. The plaintiffs' claim against all the defendants was for general damages, aggravated and exemplary damages as well as damages to be assessed for the loss of support suffered by the plaintiffs pursuant to s. 7 of the Civil Law Act 1956 or at common law. MAB in the writ action was sued on the ground that it was deemed to have taken over the liabilities and affairs of the Malaysian Airline System ('MAS'), the first defendant in the writ action, by virtue of the Malaysian Airline System Berhad (Administration) Act 2015 ('MASB Act 2015'). The third defendant was sued on the ground that he owed a duty of care to ensure continuous tracking of the missing plane while within Malaysian airspace and/or a duty to ensure safe and proper transfer of the plane to the next jurisdiction. The cause of action against the third defendant was based on s. 7 of the Civil Law Act 1956 and a breach of duty of care under the common law. The plaintiffs also relied on the doctrine of *res ipsa loquitur*. The fifth defendant was sued based on the principle of vicarious liability, being the owner of MAS and principal of the third and fourth defendants for the acts, defaults, omissions or neglects committed by the third and fourth defendants in the discharge of their duties in the course of their employments. The pleaded claim against the fourth defendant was that he breached his duty of care to investigate and verify any unusual, unidentified, unmarked and/or unaccounted for aircraft appearing on the radar of the Royal Malaysian Air Force (RMAF) in real time. The plaintiffs also relied on s. 7 of the Civil Law Act 1956 and the doctrine of *res ipsa loquitur*. The second, third, fourth and fifth defendants, separately, sought to strike out the plaintiffs' writ of summons and statement of claim, pursuant to O. 18 r. 19 of the ROC and the inherent jurisdiction of the court, on the grounds that they disclosed no reasonable cause of action, were scandalous or vexatious or otherwise an abuse of the process of the court. The High Court dismissed MAB's application but allowed the third, fourth and fifth defendants' applications. On appeal, the CA allowed MAB's application, thus reversing the order of the High Court. The CA allowed the plaintiffs' appeals against the third and fifth defendants but dismissed the plaintiffs' appeal against the fourth defendant. The sole issue for the court's determination herein was whether the CA had correctly exercised its discretion in allowing the second and fourth defendants' applications; and in dismissing the third and fifth defendants' applications.

A B C D E F G H I

Held (dismissing all appeals)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) The basic test for striking out is that the claim, on the face of it, must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', *ie*, the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. The established rule on this point is that the court should not examine the evidence in summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. (paras 19 & 20)

(2) Under art. 21 of the Montreal Convention 1999, MAS, as the carrier, shall be liable to pay compensation in the case of a death or injury of passengers and under art. 50, it is the obligation of the Government of Malaysia to require MAS to maintain adequate insurance coverage. It does not involve MAB. Hence, the articles in the Montreal Convention do not help the plaintiffs in establishing their claim against MAB. MAB was not 'the carrier', as stipulated in the articles. 'The carrier' at the material time when the MH370 incident occurred was MAS and not MAB. They were separate legal entities. (paras 29 & 30)

(3) MAB was not a successor company of MAS. By a vesting order, certain assets and liabilities of MAS were transferred and vested in MAB to ensure continuity of the business of MAS. In cl. 2.2(c) of the sale and assets liabilities agreement ('the agreement') between MAB and MAS, both parties had expressly agreed that MAB shall not assume any liabilities including any claims arising from the loss of flight MH370. The case against MAB involved an interpretation of s. 29 of MASB Act 2015, the vesting order and cl. 2.2(c) of the agreement, which could be done without having the action go for trial. Further, MAB had absolutely no link or nexus, both in law and in fact, with any of the causes of action pleaded by the plaintiffs. The action against MAB was thus plainly unsustainable with no chance of success. Hence, the plaintiffs' appeal against MAB was dismissed. (paras 31-33)

(4) The primary duty of the fourth defendant and the air force was to guard the safety of Malaysian airspace from external threats to the sovereignty of the nation. The existence of such duty to ordinary citizens would subvert and compromise the principal aim of a military force of the nation. This court agreed with the CA which held, *inter alia*, that (i) the fourth defendant was a public officer performing a specific function; (ii) his duty is to guard the sovereignty of the Malaysian air space; (iii) it is not a duty owed to passengers of commercial flights; and (iv) the fourth defendant did not owe any duty of care to the plaintiffs.

The plaintiffs' claim was obviously and legally unsustainable. Hence, the appeal by the plaintiffs against the fourth defendant was dismissed. (paras 37 44 & 46)

(5) The law on negligence in the exercise of a statutory duty or power, particularly relating to an incident involving an aircraft, is still uncertain and developing. It requires a resolution and determination of difficult legal questions in an area where the law is still unsettled. On the face of the pleadings against the third defendant, the plaintiffs' claim was not obviously unsustainable. There were triable issues that needed to be fully argued at trial. The court was not in a position to embark on a minute examination of the documents and the facts of the case at the preliminary stage of striking out application. The appeal by the third defendant was therefore dismissed and the third defendant shall remain as a defendant in the plaintiffs' action. (paras 62, 64 & 65)

(6) In law, an employer is liable for the damage caused by the delict of his employee, committed while acting within the course and scope of his duties as an employee. It is the duty of an employer to ensure that no one is injured or damaged by the employee's improper conduct or negligence in carrying on his work. (para 67)

(7) Statutorily, the liability of the fifth defendant is governed by s. 5 of the Government Proceedings Act 1956. Having dismissed the third defendant's appeal, as a result of which the third defendant remained as a defendant to the plaintiffs' action, the fifth defendant must also remain as a defendant as named in the writ on the principle of vicarious liability and by virtue of s. 5 of the Government Proceedings Act. In any event, the issue of vicarious liability, if disputed by the employer, generally involves factual determination based on evidence adduced by parties at trial. The plaintiffs must be given a chance to adduce evidence on this issue at trial. Hence, the appeal by the fifth defendant was dismissed. (paras 68-71)

***Bahasa Malaysia** Headnotes*

Tiga rayuan yang berkait di sini adalah: (i) Rayuan No. 01 (f)-14-05-2017(W) – di mana perayu-perayu ialah plaintif-plaintif di Mahkamah Tinggi ('plaintif-plaintif'); dan responden ialah Panglima Tentera Udara Diraja Malaysia ('defendan keempat'); (ii) Rayuan Sivil No. 01(f)-15-05/2017(W) – di mana perayu-perayu ialah Ketua Pengarah Jabatan Penerbangan Awam Malaysia ('defendan ketiga'); dan Kerajaan Malaya ('defendan kelima'); dan (iii) Rayuan Sivil No. 02-29-03/2017(W) – di mana perayu-perayu ialah plaintif-plaintif dan responden ialah Malaysia Airlines Bhd ('MAB'), defendan kedua. Rayuan-rayuan (i) dan (iii) adalah rayuan plaintif-plaintif terhadap penolakan rayuan mereka oleh Mahkamah Rayuan ('MR')

berhubung permohonan pembatalan bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') oleh defendan kedua dan keempat, yang menyebabkan kedua-dua defendan kedua dan keempat dibatalkan sebagai defendan dalam tindakan writ tersebut. Rayuan (ii) adalah rayuan-rayuan defendan ketiga dan kelima terhadap keputusan-keputusan MR menolak rayuan-rayuan mereka berkait dengan permohonan pembatalan mereka bawah A. 18 k. 19 KKM.

Plaintif-plaintif menyaman sebagai tanggungan si mati iaitu penumpang pesawat MH370 yang menuju ke Beijing dari Kuala Lumpur pada 8 Mac 2014; pesawat tersebut walau bagaimanapun tidak tiba di destinasinya dan selepas hilang untuk tempoh yang lama, Kerajaan mengisytiharkan bahawa kesemua penumpang dalam pesawat tersebut dianggap meninggal dunia. Tuntutan plaintif-plaintif terhadap kesemua defendan adalah untuk ganti rugi am, ganti rugi teruk dan teladan serta ganti rugi ditaksir untuk kehilangan sokongan yang dialami plaintif-plaintif menurut s. 7 Akta Undang-Undang Sivil 1956 atau bawah common law. MAB dalam tindakan writ disaman kerana dianggap mengambil alih liabiliti-liabiliti dan urusan-urusan Malaysian Airline System ('MAS'), defendan pertama dalam tindakan writ, menurut Akta Sistem Penerbangan Malaysia Berhad (Pentadbiran) 2015 ('Akta SPMB 2015'). Defendan ketiga disaman atas alasan beliau mempunyai kewajipan berjaga-jaga memastikan pengesanan berterusan pesawat yang hilang semasa dalam ruang udara Malaysia dan/atau tanggungjawab untuk memastikan pemindahan pesawat yang selamat dan sepatutnya ke bidang kuasa seterusnya. Kausa tindakan terhadap defendan ketiga adalah berdasarkan s. 7 Akta Undang-Undang Sivil 1956 dan pelanggaran kewajipan berjaga-jaga bawah common law. Plaintif-plaintif juga bersandar pada doktrin *res ipsa loquitur*. Defendan kelima disaman berdasarkan prinsip liabiliti vikarius, sebagai pemilik MAS dan sebagai prinsipal untuk defendan ketiga dan keempat terhadap tindakan-tindakan, kesalahan-kesalahan, ketinggalan-ketinggalan atau kecuaian yang dilakukan oleh defendan ketiga dan keempat dalam melaksanakan kewajipan mereka semasa menjalankan perkhidmatan. Tuntutan yang diplid terhadap defendan keempat adalah bahawa beliau melanggar kewajipan berjaga-jaga untuk menyiasat dan mengesahkan apa-apa yang luar biasa, tidak dikenal pasti, tidak ditanda dan/atau tidak dipertanggungkan terhadap pesawat yang kelihatan pada radar Tentera Udara DiRaja Malaysia pada masa sebenar. Plaintif-plaintif juga bersandar pada s. 7 Akta Undang-Undang Sivil 1956 dan doktrin *res ipsa loquitur*. Defendan kedua, ketiga, keempat dan kelima, secara berasingan, memohon untuk membatalkan writ saman dan pernyataan tuntutan plaintif-plaintif, menurut A. 18 k. 19 KKM dan bidang kuasa sedia ada mahkamah, atas alasan tidak mendedahkan kausa tindakan munasabah, remeh atau menyusahkan atau sebaliknya menyalahgunakan proses mahkamah. Mahkamah Tinggi menolak permohonan MAB tetapi membenarkan

permohonan defendan ketiga, keempat dan kelima. Atas rayuan, MR membenarkan permohonan MAB, dengan itu mengakas perintah Mahkamah Tinggi. Mahkamah Rayuan membenarkan rayuan plaintif-plaintif terhadap defendan ketiga dan kelima tetapi menolak rayuan plaintif-plaintif terhadap defendan keempat. Satu-satunya isu untuk pemutusan mahkamah dalam rayuan ini adalah sama ada MR betul dalam melaksanakan budi bicaranya membenarkan permohonan defendan kedua dan keempat; dan dalam menolak permohonan defendan ketiga dan kelima.

Diputuskan (menolak kesemua rayuan)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Ujian asas untuk pembatalan ialah bahawa tuntutan tersebut mesti 'jelas tidak boleh dikekalkan' secara zahirnya. Penekanan bukan sahaja pada perkataan 'tidak boleh dikekalkan' malah pada perkataan 'jelas', iaitu tahap tidak boleh dikekalkan mesti kelihatan secara zahir pada pernyataan tuntutan tanpa perlu mempertimbangkan butiran secara teliti. Kaedah matan bagi perkara ini adalah mahkamah tidak perlu memeriksa keterangan dalam prosiding terus hingga membawa maksud menjalankan perbicaraan atas keterangan afidavit yang bercanggah.

(2) Bawah artikel 21 Montreal Convention 1999, MAS, sebagai pengangkut udara, bertanggungan membayar pampasan dalam kes kematian atau kecederaan penumpang dan bawah artikel 50, menjadi kewajipan Kerajaan Malaysia untuk memerlukan MAS mengekalkan perlindungan insurans yang mencukupi. Ini tidak melibatkan MAB. Oleh itu, artikel-artikel dalam Montreal Convention tidak membantu plaintif-plaintif membuktikan tuntutan mereka terhadap MAB. MAB bukan 'pengangkut' seperti yang diperuntukkan dalam artikel-artikel tersebut. 'Pengangkut' pada masa material semasa kejadian MH370 berlaku ialah MAS dan bukan MAB. Kedua-duanya adalah entiti undang-undang berasingan.

(3) MAB bukan pengganti syarikat MAS. Melalui satu perintah peletakan hak, aset-aset dan liabiliti-liabiliti tertentu MAS dipindah milik dan diletak hak dalam MAB untuk memastikan kesinambungan perniagaan MAS. Dalam kl. 2.2(c) Perjanjian Jualan dan Liabiliti Aset ('perjanjian') antara MAB dan MAS, kedua-dua pihak bersetuju secara langsung bahawa MAB tidak perlu mengambil alih apa-apa liabiliti termasuk apa-apa tuntutan berikutan kehilangan pesawat MH370. Kes terhadap MAB melibatkan tafsiran s. 29 Akta SPMB 2015, perintah peletakan hak dan kl. 2.2(c) perjanjian tersebut, yang boleh dibuat tanpa perlu dibicarakan. Selanjutnya, MAB jelas tiada langsung kaitan atau hubungan, sama ada dari segi undang-undang dan fakta, dengan apa-apa kausa tindakan yang

diplid oleh plaintif-plaintif. Tindakan terhadap MAB oleh itu jelas tidak boleh dikekalkan tanpa peluang untuk berjaya. Dengan itu, rayuan plaintif-plaintif terhadap MAB ditolak.

(4) Tanggungjawab asas defendan keempat dan tentera udara adalah untuk melindungi keselamatan ruang udara Malaysia daripada ancaman terhadap kedaulatan negara. Kewujudan tanggungjawab sedemikian pada rakyat biasa akan menggulingkan dan mengkompromi tujuan asas pasukan tentera negara ini. Mahkamah ini bersetuju dengan MR yang memutuskan, antara lain, bahawa (i) defendan keempat ialah pegawai awam yang melaksanakan fungsi khusus; (ii) tanggungjawabnya adalah untuk melindungi kedaulatan ruang udara Malaysia; (ii) tanggungjawab tersebut bukan terhadap penumpang pesawat komersial; dan (iv) defendan keempat tidak mempunyai kewajipan berjaga-jaga terhadap plaintif-plaintif. Tuntutan plaintif-plaintif, jelas, dan dari segi undang-undang, tidak boleh dikekalkan. Oleh itu, rayuan plaintif-plaintif terhadap defendan keempat ditolak.

(5) Undang-undang kecuaian dalam melaksanakan tanggungjawab atau kuasa statutori, khususnya berkaitan dengan insiden melibatkan pesawat udara, masih tidak tetap dan berkembang. Ini memerlukan resolusi dan penentuan persoalan undang-undang yang rumit dalam bidang di mana undang-undangnya masih tidak tetap. Berdasarkan pliding-pliding terhadap defendan ketiga secara zahirnya, tuntutan plaintif-plaintif jelas tidak boleh dikekalkan. Terdapat isu-isu yang perlu dibicarakan yang perlu dihujahkan sepenuhnya semasa perbicaraan. Mahkamah ini tiada kedudukan untuk memulakan pemeriksaan terperinci dokumen-dokumen dan fakta-fakta kes di peringkat awalan permohonan pembatalan. Oleh itu, rayuan defendan ketiga ditolak dan defendan ketiga mesti kekal sebagai salah satu defendan dalam tindakan plaintif-plaintif.

(6) Di sisi undang-undang, majikan bertanggungan terhadap kerugian yang disebabkan oleh kesalahan pekerjanya, yang dilakukan semasa dalam penjalanan atau dalam skop tanggungjawabnya sebagai pekerja. Kewajipan majikan adalah memastikan tiada sesiapa pun tercedera atau mengalami kerugian oleh tindakan tidak wajar atau kecuaian pekerjanya dalam membuat kerjanya.

(7) Secara statutori, liabiliti defendan kelima tertakluk bawah s. 5 Akta Prosiding Kerajaan 1956. Oleh sebab rayuan defendan ketiga ditolak, menyebabkan defendan ketiga kekal sebagai defendan dalam tindakan plaintif-plaintif, defendan kelima juga mesti kekal sebagai defendan seperti yang dinamakan dalam writ atas prinsip liabiliti vikarius dan

menurut s. 5 Akta Prosiding Kerajaan. Walau apa pun, isu liabiliti vikarius, jika dipertikaikan oleh majikan, secara amnya melibatkan pemutusan fakta berdasarkan keterangan yang dikemukakan pihak-pihak semasa perbicaraan. Plaintif-plaintif perlu diberi peluang mengemukakan keterangan atas isu ini dalam perbicaraan. Oleh itu, rayuan defendan kelima ditolak.

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Attorney General of the Duchy of Lancaster v. London and North Western Railway Company [1892] 3 Ch 274 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Barrett v. Enfield Borough Council [1999] YJH 25 ***(refd)***

"Bunga Melati 5 Case" [2012] 4 SLR 546 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

Feldman (Pty) Ltd v. Mall [1945] AD 733 ***(refd)***

Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clard Ltd [1899] 1 QB 86 ***(refd)***

Lee Nyan Choi v. Voon Noon [1978] 1 LNS 94 FC ***(refd)***

Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***

Sri Devi Kanan & Ors v. Malaysian Airline System Bhd & Ors [2017] 2 CLJ 728 HC ***(foll)***

Williams v. Canada (Attorney General) [2005] 76 OR 3rd ***(refd)***

Legislation referred to:

Civil Aviation Act 1969, ss. 2A, 2B, 3(1)

Civil Law Act 1956, s. 7

Government Proceedings Act 1956, s. 5

Malaysian Airline System Berhad (Administration) Act 2015, s. 29

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), O. 33 r. 3

For the plaintiffs - Sangeet Kaur Deo, Ngeow Chow Ying & Tan Chee Kian; M/s Ngeow & Tan

For the 2nd defendant - Logan Sabapathy, Sanjeev Kumar, Carmelia Cheong & Najihah Farhana Che Awang; M/s Sanjeev Kumar

For the 3rd, 4th & 5th defendants - Alice Loke Yee Ching SFC & Shaiful Nizam Shahrin FCs

[Editor's note: For the Court of Appeal judgment, please see Malaysian Airlines Bhd v. Tan Wei Hong & Ors [2017] 6 CLJ 34; Tan Wei Hong & Ors v. Malaysia Airlines System Bhd & Ors [2018] 2 CLJ 84 (affirmed).]

Reported by S Barathi

A

JUDGMENT

Ramly Ali FCJ:

Introduction

[1] There were three related appeals before us, heard together, namely:

B

(a) Civil Appeal No. 01 (f)-14-05-2017(W) – where the appellants were the plaintiffs at the High Court (collectively referred to as "the plaintiffs"); and the respondent was Panglima Tentera Udara Diraja Malaysia (referred to as "the fourth defendant");

C

(b) Civil Appeal No. 01(f)-15-05-2017(W) – where the appellants were Ketua Pengarah Jabatan Penerbangan Awam Malaysia (referred to as "the third defendant"); and the Government of Malaysia (referred to as "the fifth defendant"); and

D

(c) Civil Appeal No. 02-29-03-2017(W) – where the appellants were the plaintiffs and the respondent was Malaysia Airlines Bhd (referred to as "the second defendant").

[2] In appeals (a) and (c) above, the appellants were appealing against the decisions of the Court of Appeal dismissing their appeals in relation to a striking out application under O. 18 r. 19 of the Rules of Court 2012 (the E ROC) filed by the second defendant and the fourth defendant, which resulted in both the second and fourth defendants being struck out as defendants in the writ action.

[3] In appeal (b), both the third and fifth defendants were appealing against the decisions of the Court of Appeal dismissing their appeals in F relation to their striking out applications under O. 18 r. 19 of the ROC.

The Parties

[4] The plaintiffs were suing as dependants of the deceased persons who were passengers on board flight MH370 which was bound for Beijing from G Kuala Lumpur on 8 March 2014; the said flight, however, did not arrive at its destination and after going missing for some time, the Government announced that all passengers on board were presumed dead.

[5] The second defendant in the writ action was sued on the ground that it was deemed to have taken over the liabilities and affairs of the Malaysian H Airline System (MAS) (the first defendant in the writ action, but not a party to the present appeals) by virtue of the Malaysian Airline System Berhad (Administration) Act 2015 (Act 765).

[6] The third defendant was sued on the ground that he owed a duty of care to ensure continuous tracking of the missing plane while within I Malaysian airspace and/or a duty to ensure safe and proper transfer of the

plane to the next jurisdiction. The cause of action against the third defendant was based on s. 7 of the Civil Law Act 1956 (on dependency claim) and a breach of duty of care under the common law. The plaintiffs also relied on the doctrine of "*res ipsa loquitur*". A

[7] The fifth defendant was sued based on the principle of vicarious liability, being the owner of MAS (first defendant) and principal of the third and fourth defendants for the acts, defaults, omissions or neglects committed by the third and fourth defendants in the discharge of their duties in the course of their employment. B

[8] The pleaded claim against the fourth defendant was that he breached his duty of care to investigate and verify any unusual, unidentified, unmarked and/or unaccounted for aircraft appearing on the radar of the Royal Malaysian Air Force (RMAF) in real time. The plaintiffs also relied on s. 7 of the Civil Law Act 1956 (on dependency claim) and the doctrine of "*res ipsa loquitur*". C

[9] After having been served with the writ and statement of claim and having filed their respective defence, the third, fourth, fifth and second defendants filed separate applications pursuant to O. 18 r. 19(1)(a), (b) and (d) of the ROC and the inherent jurisdiction of the court to strike out the plaintiffs' writ of summons and statement of claim dated 28 August 2015 on the grounds that they disclosed no reasonable cause of action, were scandalous or vexatious or otherwise an abuse of the process of the court. D E

[10] On 30 March 2016, the High Court at Kuala Lumpur dismissed the second defendant's application but allowed the third, fourth and fifth defendants' applications. On appeal, the Court of Appeal allowed the second defendant's application, thus reversing the order of the High Court. The Court of Appeal allowed the plaintiffs' appeals against the third and fifth defendants but dismissed the plaintiffs' appeal against the fourth defendant. F

[11] The plaintiffs' claim against all the defendants was for general damages, aggravated and exemplary damages as well as damages to be assessed for the loss of support suffered by the plaintiffs pursuant to s. 7 of the Civil Law Act 1956 or at common law. G

[12] At the conclusion of the hearing of the appeals before this court on 28 November 2017, we dismissed all the appeals. We now give our reasons for doing so. H

Our Decision

[13] All the appeals were related to applications by the second, third, fourth and fifth defendants to have the plaintiffs' writ of summons and statement of claim against them strike out. The sole issue for our determination was whether the Court of Appeal had correctly exercised its discretion in allowing the second and fourth defendants' applications; and in dismissing the third and fifth defendants' applications. I

[14] Before going any further, it is desirable at this stage to briefly state the relevant statutory provisions relating to striking out applications. These are in O. 18 r. 19 of the ROC.

[15] Order 18 r. 19 of the ROC provides:

Striking out pleadings and endorsements (Order 18 rule 19)

19 (1) The court may at any stage of the proceedings order to be stuck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[16] The principle for striking out of pleadings pursuant to O. 18 r. 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC; *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86; *Attorney General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).

[17] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder (supra)* are, *inter alia*, as follows:

(a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;

(b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;

(c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

(e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[18] The Court of Appeal in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473, had adopted the well-settled principle of striking out in the following passage:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial, (see; *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (Federal Court).

[19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder (supra)* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie, the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.

[20] The established rule on this point is that the court should not examine the evidence in summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords case of *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 at p. 407:

> … The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial …

This passage was cited with approval by the Privy Council in the Malaysian case of *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212.

[21] For a better understanding of the issues in this judgment, we will deal with the respective defendants in relation to their applications to strike out the plaintiffs' claim against them, separately.

A **Second Defendant: Malaysia Airlines Berhad (MAB)**

[22] The plaintiffs' pleaded case against the second defendant was that the second defendant, pursuant to Act 765 was deemed to have and would be taking over all the liabilities of the first defendant (MAS). (The plaintiffs' claim against MAS in the same suit was premised on a breach of contract and
B a breach of a duty of care).

[23] After filing its defence, the second defendant on 23 December 2015 filed an application to have the plaintiffs' writ of summons and statement of claim struck out pursuant to O. 18 r. 19(1)(a), (b) and (d) of the ROC and the inherent jurisdiction of the court, on the grounds that the plaintiffs had
C no cause of action against the second defendant and that the plaintiffs' claim was frivolous, vexatious and an abuse of the process of the court.

[24] The second defendant's main contention was that it is an entity incorporated on 7 November 2014, some eight months after the occurrence
D of the loss of flight MH370; and that it is not referred to as a successor company of MAS under Act 765 and that the transfer of assets and liabilities from MAS to the second defendant under Act 765 is limited to specific assets and liabilities that the parties have agreed as being subject to transfer. The assets and liabilities so specified expressly exclude the liabilities arising from
E the loss of flight MH370.

[25] The High Court dismissed the second defendant's application on 30 March 2016 on the ground that whether the second defendant's relationship with MAS was such that would wholly or partly assume the liabilities of MAS was not clear. The second defendant's stand was that it had
F no nexus or link, in law or in fact, with any of the causes of action pleaded by the plaintiffs relating to the loss of flight MH370.

[26] The Court of Appeal, after having heard the appeal filed by the second defendant, held that the learned High Court Judge had manifestly failed to consider and had omitted to take into account the effect of the legislative
G intent of Act 765: which is to vest only certain liabilities of MAS in the second defendant and the vesting order clearly does not include the liabilities of MAS in respect of the loss of flight MH370. The Court of Appeal ruled that the second defendant had convincingly established that the plaintiffs had wrongly impleaded it to the action and the plaintiffs' attempt to refute this
H fact was completely unconvincing. In conclusion, the Court of Appeal found that the claim against the second defendant was eminently one that was plainly or obviously unsustainable and had no chance of success. In the upshot, the second defendant's appeal was allowed.

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[27] The plaintiffs subsequently appealed to this court against the said decision of the Court of Appeal *vide* Civil Appeal No. 02-29-03-2017(W). The plaintiffs were granted leave to appeal on 1 March 2017 on the following question of law:

> whether the non-vesting of the contingent liability of the defendant, Malaysian Airlines System Berhad (MAS) to MAB under the Act to satisfy any Judgment entered against MAS after all its assets are vested in MAB would constitute asset-striping of MAS, and carried out in order to defeat the satisfaction of such judgment against MAS: in consequence, it is an unlawful exercise of discretion under the Act?

[28] We have read the full judgment of the Court of Appeal on this matter involving the second defendant's application to strike out. We are attracted to the following passages in the said judgment (being paras. 11, 12, 21 and 22 thereof):

> [11] … Pausing here, we would thus say that even if the preamble of Act 765 is not an operating part thereof, for the purpose of determining the legislative intent of Act 765, the preamble ought not to be read in isolation, it should instead be read in totality and consonant with the purpose for which Act 765 has been enacted by Parliament. When this is done, it becomes clear that the purpose of Act 765 is to establish the appellant (ie, the 2nd defendant) so that it, amongst others, can ensure continuity etc. and assume certain assets and liabilities of MAS, Act 765 requires that such assumption of certain assets and liabilities by the appellant will be carried out in an effective, efficient and seamless means by way of a Vesting Order.
>
> [12] … such vesting, as envisaged under section 29 of the Act 765, was made, as aforestated, through the Vesting Order dated 1.9.2015 which was later gazetted on 6.11.2015 as P.U.(A) 265/2015. We would once again emphasise, and indeed there is not the slightest room for doubt, that no such liabilities in connection with MH370 has been vested in or transferred to the appellant pursuant to the Vesting Order in question as contended or alleged by the respondents. This is also consonant with the agreement between MAS and the appellant where it is expressly agreed, *inter alia*, that the appellant shall not assume any liabilities including any claims arising from the loss of MH370. This is found in clause 2.2(c) of the Agreement [Exhibit A-2].
>
> [21] A trial of this action would not reveal or add anything more to what was already before the High Court. Further, it is difficult to see what evidence could have any bearing on the interpretation of the Vesting Order and Clause 2.2(c) of the Agreement. Accordingly, and in the absence of disputes over the evidence, all that the High Court had to do so was to interpret section 29 of Act 765, the Vesting Order and clause 2.2(c) of the Agreement. Had the learned Judge

done so, there should be no reason for His Lordship to ignore a logical and correct interpretation of those materials that would show that it was not only a straightforward matter but also one where the claim is on the face of it obviously unsustainable that would have led to the claim against the appellant being struck out.

[22] We are consequently led to one glaring conclusion which is that the learned Judge had erred in assuming that MAS would necessarily cease to exist, that contrary to the Vesting Order and the Agreement, the liability in this case had been or could be transferred to or vested in the appellant and that the potential consequences to the respondents of MAS ceasing to exist was a factor to be taken into account in deciding whether the claim should be struck out. In sum, the learned Judge did not direct himself according to the correct and well-established approach in dealing with an application under Order 18 rule 19 of the Rules of Court 2012 in failing to accord due consideration and weight to the Vesting Order the Agreement and the application of Act 765 in particular the third paragraph of the preamble to and section 29(1) of Act 765 which when considered together would have shown that the appellant has absolutely no nexus both in law and in fact with any of the causes of action pleaded by the respondents in connection with the loss of flight MH370.

We are in agreement with the Court of Appeal on the issues as narrated above.

[29] The issue of the Montreal Convention 1999 was raised by learned counsel for the plaintiffs in this appeal. The Montreal Convention 1999 was given force of law in Malaysia by our Carriage by Air Act 1974. Learned counsel submitted that under article 21 of the Convention, the Malaysian Airline System (MAS) as the carrier shall be liable to pay compensation in case of death or injury of passengers. Under art. 50 of the Convention "state parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the state party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under the Convention." Under article 21, it is the obligation of MAS (not MAB) to pay compensation in case of death and injury to passengers and under article 50, it is the obligation of the Government of Malaysia to require MAS to maintain adequate insurance coverage. It does not involve MAB.

[30] We are of the view that the above articles in the Montreal Convention do not help the plaintiffs in establishing their claim against the second defendant. The second defendant was not "the carrier" as stipulated in the articles. "The carrier" at the material time when the MH370 incident occurred was the Malaysian Airline System (MAS), not the second defendant. They are separate legal entities.

[31] The link between MAS and the second defendant was through Act 765 and an agreement entered into between them. Even though learned counsel for the plaintiffs referred to the first defendant as "the old MAS" (referring to the Malaysian Airline System) and the second defendant as "the new MAS", in actual fact they are separate entities. The second defendant is not a successor company of MAS.

[32] By a vesting order dated 1 September 2015 (which was later gazetted on 6 November 2015 as P.U. (A) 265/2015), certain assets and liabilities of MAS were transferred and vested in the second defendant to ensure continuity of the business of MAS. We agree with the Court of Appeal in its finding that "… indeed there is not the slightest room for doubt that no such liabilities in connection with the loss of flight MH370 has been vested or transferred to the appellant (the second defendant) pursuant to the vesting order in question as contended or alleged by the respondents (the plaintiffs)".

[33] There was an agreement known as "the sale & assets liabilities agreement" dated 21 August 2015 between the second defendant and MAS relating to the transfer of assets and liabilities from MAS to the second defendant. In cl. 2.2(c) of the said agreement, both parties had expressly agreed that the second defendant shall not assume any liabilities including any claims arising from the loss of flight MH370. The case against the second defendant only involved an interpretation of s. 29 of Act 765, the vesting order dated 1 September 2015 and cl. 2.2(c) of the agreement dated 21 August 2015. That interpretation can be done without having the action against the second defendant go for trial. It is a straightforward matter of interpretation. Apart from that, the second defendant has absolutely no link or nexus both in law and in fact with any of the causes of action pleaded by the plaintiffs in connection with the loss of flight MH370. We therefore agree with and endorse the decision of the Court of Appeal that "the action against the second defendant was eminently one that is plainly unsustainable and has no chance of success." Therefore, the plaintiffs' present appeal against the second defendant was dismissed.

Fourth Defendant: Panglima Tentera Udara Malaysia (RMAF)

[34] The fourth defendant was in control of the operation of the RMAF. The pleaded case against him was that he had breached his duty of care and had failed to investigate and verify any unusual, unidentified, unmarked, and/or unaccounted for aircraft appearing on the RMAF's radars in real time. The plaintiffs relied on the doctrine of *res ipsa loquitor*. The pleaded cause of action against him was under s. 7 of the Civil Law Act 1956 (for dependency claim) and breach of duty of care under the common law.

[35] In his application to strike out the plaintiffs' writ and statement of claim, the fourth defendant contended that there was no common law duty of care owed by him to the plaintiffs because the damage was not foreseeable and/or there was no proximity of relationship between them; and therefore the doctrine of *res ipsa loquitor* did not apply.

[36] The High Court allowed the fourth defendant's application on the ground that even if he owed a common law duty of care in the manner as pleaded by the plaintiffs, he had carried out his duties satisfactorily and therefore there was no breach of any duty of care under the common law; and that the damage suffered by the plaintiffs was not foreseeable.

[37] On appeal by the plaintiffs, the Court of Appeal dismissed the appeal. The Court of Appeal made the following findings:

(a) the 4th defendant is a public officer performing a specific function;

(b) his duty is to guard the sovereignty of the Malaysian air space;

(a) it is not a duty owed to passengers of commercial flights;

(b) the 4th defendant does not owe any duty of care to the plaintiffs; and

(c) the 2nd defendant was rightly struck out by the High Court.

[38] Dissatisfied with the above decision, the plaintiffs filed an application for leave to appeal to this court. Leave to appeal was granted on 13 April 2017 on the following questions of law:

(a) whether the duties and liability of the RMAF would extend to the disappearance of flight MH 370 on 8.3.2014 having regard to the:

(i) The Chicago Convention

(ii) The Civil Aviation Act 1969

(iii) Malaysia's National Defence Policy

(b) whether the duties and liability of the RMAF would extend to the search and rescue operations of flight MH370 on 8.3.2014 having regard to the:

(i) The Chicago Convention

(ii) The Civil Aviation Act 1969

(iii) Malaysia's National Defence Policy

(c) whether the RMAF was under a common law duty of care to civilian aircraft in this instance, flight MH370.

[39] On the duty owed by the fourth defendant, Azizul Azmi Adnan J had, in another case involving different plaintiffs but a similar nature of claim involving passengers of flight MH370, *Sri Devi Kanan & Ors v. Malaysia Airline System Bhd & Ors* [2017] 2 CLJ 728; [2017] 7 MLJ 305, stated as follows:

[33] In the statement of claim, the plaintiffs claimed that, among others, TUDM (in our judgment referred to as the 4th defendant) did not take adequate steps after their military radar detected the turning back of MH370 from its original north-easterly course.

[34] In my judgment, the air force does not owe any duty of care to private citizens, whether to track and report the location of non-military aircraft, to intercept or to search for such aircraft, or, as suggested by the statement of claim, to be accountable for adequate and satisfactory answers to the family members such as the plaintiffs.

[35] The primary duty of TUDM is to guard the safety of Malaysian airspace from external threats to the sovereignty of the nation. The government may, as a matter of practice and custom, utilise the resources for the military for what may essentially be civilian purposes (such as search and rescue, or relief work in the event of a natural disaster), but the military does not and cannot owe a duty to ordinary private citizens for the discharge of those functions. The existence of such a duty would subvert and compromise the principal aim of a military force.

[36] Of course, this does not mean that the military is immune from suits brought by private citizens. For example, if in the proper performance of its functions an accident is caused by the military resulting in loss or damage to a private citizen, that citizen will be well within his or her rights to claim for compensation for such loss or damage. That was not, however, the case here.

[40] The Court of Appeal was in full agreement with the above findings made by Azizul Azmi Adnan J and concluded that "It is plain and obvious that the fourth defendant does not owe any duty of care to the plaintiffs and we find it impossible to conclude otherwise in this instant appeal. Therefore the claim against the fourth defendant was rightly struck out by the learned judge."

[41] We have read the full judgments of the High Court as well as the Court of Appeal on issues relating to the fourth defendant. We are in full agreement with their findings and decisions; and we accordingly adopted them for the purpose of our judgment. We found no reason to disagree with both the courts below.

[42] The issues of the Chicago Convention; the Civil Aviation Act 1969; and the Malaysian National Defence Policy were raised by learned counsel for the plaintiffs in his submissions before us. According to learned counsel, the Chicago Convention places certain duties on the military authorities of each contracting country, in relation to civilian aircraft in order to facilitate coordination with the military to avoid the need to intercept civilian flights. As such, learned counsel contended that in relation to the loss of flight MH370, the fourth defendant certainly did owe a duty of care to the said aircraft, the passengers therein and their next of kin.

[43] The Civil Aviation Act 1969 was brought in by learned counsel on the ground that s. 3(1) of the Act stipulates that the provisions of the Chicago Convention are to be given effect and carried out in this country by way of regulations to be made by the Minister. This includes any annex to it and any amendments of such Convention and annexes.

[44] This point had also been answered and clarified by Azizul Azmi Adnan J in *Sri Dewi a/p Kanan* case *(supra).* We are of the same view with His Lordship that the fourth defendant and the air force "does not owe any duty of care to private citizens whether to track and report the location of non-military aircraft, to intercept or to search for such aircraft or … to be accountable for adequate and satisfactory answers to the family members such as the plaintiffs." As clearly stated in the said judgment, the primary duty of the fourth defendant and the air force is to guard the safety of Malaysian airspace from external threats to the sovereignty of the nation. The existence of such duty to ordinary citizens as suggested by learned counsel for the plaintiffs in his submissions would subvert and compromise the principal aim of a military force of the nation. On that ground, the point relating to the Civil Aviation Act 1969 as contended by learned counsel is without any merit at all.

[45] We were also in agreement with the Court of Appeal that the plaintiffs' claim against the fourth defendant was rightly struck out by the High Court. We were of the view that in this case (against the fourth defendant) it was clear as a matter of law at the outset that even if the plaintiffs were to proceed in proving all the facts that they offered to prove at trial, they would not be entitled to the remedy they sought for. In other words, the plaintiffs' claim is obviously and legally unsustainable. The factual basis of the claim is fanciful and entirely without substance and therefore cannot be allowed to go for trial. (see: "*Bunga Melati 5 Case*" [2012] 4 SLR 546).

[46] Based on the above considerations, we dismissed the appeal by the plaintiffs against the fourth defendant and we affirmed the decision of the Court of Appeal.

Third Defendant: Ketua Pengarah, Jabatan Penerbangan Awam Malaysia

[47] The Director General of the Department of Civil Aviation (DCA) was named as the third defendant in the plaintiffs' writ and statement of claim. DCA is a Government department under the purview of the Ministry of Transport of Malaysia with the responsibility and authority to regulate and oversee all the technical operational aspects of the civil aviation industry in Malaysia, including civil air traffic control, and service and management of the Kuala Lumpur Air Traffic Control Centre (KLATCC). The KLATCC was at all times within the control of the third defendant.

[48] The pleaded case against the third defendant was based on a breach of statutory duty by virtue of the Civil Aviation Act 1969. It was pleaded that the third defendant through KLATCC had failed in his basic statutory duty to track and monitor flight MH370 while within the Malaysia airspace; and failed to ensure a safe and proper transfer to the next air traffic control tower. A

[49] Learned Senior Federal Counsel (SFC), acting for and on behalf of the third and fifth defendants, in a nutshell, argued that in the present case, the essential ingredients of duty of care in a cause of action for negligence against the third defendant did not exist and therefore the plaintiffs' action in negligence could not be maintained. B

[50] After having filed his statement of defence, the third defendant filed an application to strike out the plaintiffs' action under O. 18 r. 19 of the ROC on the ground that the plaintiffs had not pleaded a reasonable cause of action against him in their statement of claim. C

[51] The High Court allowed the application made by the third defendant, as a result of which the plaintiffs' action against the third defendant was struck out. D

[52] On appeal by the plaintiffs, the Court of Appeal allowed the appeal. The order of the High Court in relation to the third defendant was set aside and the third defendant was then reinstated as a defendant in the action. In coming to its decision to allow the appeal, the Court of Appeal ruled, *inter alia*, as follows: E

> (a) we think that the plaintiffs' case requires the court to enter into a fact finding analysis in order to determine whether the 3rd defendant owes a duty of care to the plaintiffs and this court must guard against the possibility of depriving the plaintiffs of access to the judgment seat without benefit of a trial where they have an opportunity to bring forth all the relevant facts. F
>
> (b) We are satisfied that the plaintiffs' statement of claim was sufficient to put the defendants to notice of the essence of the plaintiffs' claim. The 3rd defendant's duty of care to ensure continuous tracking of MH370 while within the Malaysia Airspace and to ensure a safe and proper transfer to the next air traffic control tower is clearly pleaded as material facts. These facts, in our view, were sufficient to support the claim for negligence on the part of the 3rd defendant. G H

[53] The Court of Appeal concluded that the factual issues, particularly regarding the extent of the statutory duties of the third defendant, the issue of whether the third defendant had carried out his duties in the circumstances of the case and the applicability of the doctrine of *res ipsa loquitor* as pleaded by the plaintiffs, required close examination by the court and could only be I

resolved after careful examination of the evidence from both sides which the court could not embark upon at the preliminary stage of a striking out application. These issues were triable issues that needed to be decided and determined at trial.

[54] The third defendant filed an application for leave to appeal to this court against the decision of the Court of Appeal allowing the plaintiffs' appeal. Leave to appeal was granted on the following question of law, namely, "Whether an action in negligence can lie against the Director General of Civil Aviation in the exercise of his functions under the Civil Aviation Act 1969 (Act 3)?"

[55] Before us, learned counsel for the plaintiffs submitted that in his defence, the third defendant had admitted that the DCA had a statutory duty of care to the extent of the provisions of the Civil Law Act 1969 and it was the responsibility of the third defendant to regulate and manage the safe passage of aircraft over Malaysian airspace and/or air traffic control functions.

[56] Learned counsel also submitted that the third defendant was responsible to track and monitor aircraft. It was directly foreseeable. If he failed to keep the track, he could lose track of an aircraft and therefore the loss of the plane leading to the presumed death of the passengers was not too remote.

[57] Learned counsel further submitted:

> The DCA (3rd defendant) is a government agency with the specific authority and duty to regulate all technical operational aspects of the civil aviation industry within Malaysia. The basic duty of the KL Air Traffic Control Centre is to track and monitor aircraft. The relationship between the passenger of the flight and the 3rd defendant is such that they are entitled to rely on the 3rd defendant performing its duties with due care expected of reasonable person in ensuring the safety of the flight. The preliminary report produced by the 5th defendant and or its servants, does not reveal clear evidence of MH370 leaving Malaysian airspace. In fact the said report shows evidence of the aircraft made an air turn back and headed towards Penang.

[58] Learned SFC, in rebutting the plaintiffs' allegations, listed out the duties and functions of the third defendant as provided for in s. 2B of the Civil Aviation Act 1969:

> Duties and functions of the Director General 2B.
>
> It shall be the duty and function of the Director General:
>
> (a) to exercise regulatory functions in respect of civil aviation and airport and aviation services including the establishment of standards and their enforcement;

(b) to represent the government in respect of civil aviation matters and to do all things necessary for this purpose;

(c) to ensure the safe and orderly growth of civil aviation throughout Malaysia;

(d) to encourage the development of airways, airport and air navigation facilities for civil aviation;

(e) to promote the provision of efficient airport and aviation services by the licensed company; and

(f) to promote the interests of users of airport and aviation services in Malaysia in respect of the prices charged for, and the quality and variety of, services provided by the licensed company.

[59] Learned SFC contended that ss. 2A and 2B of the Civil Aviation Act 1969, which were included by way of amendments *vide* Act 803 in 1992, provide *inter alia* for regulatory functions in respect of civil aviation, airport and aviation services. The duties under s. 2B are duties created by statute which cannot support the creation of a common law duty of care to passengers of commercial flights. The statutory duties and functions under s. 2B were not created for the purpose of protecting the interests of the passengers on board commercial flights; and it would be placing an onerous burden on the third defendant if liability were to be imposed upon him as part of the exercise of his functions to ensure that a commercial flight reaches its destination.

[60] Learned SFC further contended that the third defendant owed no duty of care to the plaintiffs nor the deceased passengers in the exercise of his statutory duties as provided for in the Civil Aviation Act 1969; and an action in negligence under the common law cannot lie against him. The mere fact that statutory duties exist does not in itself create a parallel duty of care at common law.

[61] After hearing both parties, we share the same view with the Court of Appeal that the issues of whether the third defendant owed any duty of care to the plaintiffs and whether there was a breach of that duty in the circumstances of the present case were not straightforward. The issues involve complex questions of law and fact. They require a close and careful examination of evidence from both sides. These issues are triable issues. The plaintiffs' claim against the third defendant cannot be struck out at the preliminary stage under O. 18 r. 19 of the ROC. This is not a plain and obvious case to be struck out.

[62] The law on negligence in the exercise of a statutory duty or power particularly relating to an incident involving an aircraft (as in the present appeal) is still uncertain and developing. It requires a resolution and determination of difficult legal questions in an area where the law is still

unsettled. The court should be cautious and careful before striking out claims made under such circumstances (see: *Barrett v. Enfield Borough Council* [1999] YJH 25; [2001] 2 AC 550; *Williams v. Canada (Attorney General)* [2005] 76 OR 3rd).

[63] We find support for the above proposition in the words of Lord Browne-Wilkinson in the case of *Barrett v. Enfield Borough Council (supra)* who had expressed his view that "… in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment, it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out".

[64] We are also of the view that in dealing with an application for striking out, the court must exercise great care and caution, bearing in mind that the court must not drive away any litigant however weak his case may be from the seat of justice (see: *Lee Nyan Choi v. Voon Moon* [1978] 1 LNS 94; [1979] 2 MLJ 28). On the face of the pleadings against the third defendant, the plaintiffs' claim is not obviously unsustainable. There are triable issues that need to be fully argued at trial. This is a case where the court is not in a position to embark on a minute examination of the documents and the facts of the case at this preliminary stage of striking out application. That is solely reserved for the trial judge.

[65] In the upshot, we dismissed the appeal by the third defendant and we upheld the decision of the Court of Appeal. The third defendant shall remain as a defendant in the plaintiffs' action.

Fifth Defendant: The Government Of Malaysia

[66] The Government of Malaysia was named as the fifth defendant in the plaintiffs' action. The plaintiffs' claim against the fifth defendant was based upon the principle of vicarious liability applying to the fifth defendant as the employer of the third and fourth defendants; and the fifth defendant's duty to manage the disappearance of flight MH370 with due care, respect, transparency and accountability.

[67] The principle of vicarious liability is a principle at common law where one person is liable for the delict of another. It applies to an employer and employee relationship. Thus, in law, an employer is liable for the damage caused by the delict of his employee, committed while acting within the course and scope of his duties as an employee. It is the duty of an

employer to ensure that no one is injured or damaged by the employee's improper conduct or negligence in carrying on his work (see: *Feldman (Pty) Ltd v. Mall* [1945] AD 733).

[68] Statutorily, the liability of the fifth defendant as the Government is governed by s. 5 of the Government Proceedings Act 1956, which provides:

> 5. Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the government.

[69] In the present appeal, having dismissed the third defendant's appeal, as a result of which the third defendant remains as a defendant to the plaintiffs' action, we were of the view that the fifth defendant must also remain as a defendant in this action as named in the writ on the principle of vicarious liability and by virtue of s. 5 of the Government Proceedings Act 1956.

[70] In any event, the issue of vicarious liability if disputed by the employer generally involves factual determination based on evidence adduced by parties at trial. The plaintiffs must be given a chance to adduce evidence on this issue at trial.

[71] Based on that ground, we also dismissed the appeal by the fifth defendant. Therefore the fifth defendant remains as a defendant in the plaintiffs' action.

Conclusion

[72] In the upshot, we dismissed all the three appeals before us. We upheld and affirmed the decisions of the Court of Appeals on all the three appeals. We ordered that costs of RM10,000 be paid by the plaintiffs to the fourth defendant in Civil Appeal No: 01(f)-14-05-2017(W). We made no order as to costs with regard to the other two appeals. Deposits, if any, were ordered to be refunded.